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Supreme Court of the United States

OCTOBER TERM, 1955

No. 281

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH P. RYAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE

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BRIEF AMICUS CURIAE

By Pierce Butler, John C. Benson and
M. J. Doherty of the Minnesota Bar

This brief is filed in support of respondent and of the decision of the Court of Appeals. The special interest of the subscribers derives from their representation of certain defendants recently convicted in the District Court of Minnesota of violation of Section 302(a) of the Taft-Hartley Act (29 U.S.C. 186)[1], in which case motions for a new trial are

[1]The order of the Court disposing of certain motions in this case is reported in *United States* v. *Brennan, et al*, 134 F. Supp. 42. Subscribing counsel appeared for the defendants Archer-Daniels-Midland Company and James W. Moore, its Vice-President.

pending, based upon the ground that the convictions were erroneous.

This brief will be devoted largely to the question of the constitutionality of Section 302(a) and (b) under the due process clause of the Fifth Amendment, with some discussion of interpretation incidental to that question. The constitutional principle to be urged is, simply stated, that for validity a criminal statute must be so clear and certain on its face as to be readily understandable by persons of ordinary intelligence. Fuller discussion of the subject will follow later.

ARGUMENT

The word "representative" as used in Section 302(a) and (b) of the Taft-Hartley Act means representative of employees for collective bargaining purposes. The meaning attributed to the word by the Government (i.e., "ordinary", "usual", "everyday" meaning) would render the section unconstitutional.

The validity of the conviction of the respondent Ryan, as in the case of the convictions in the Minnesota case, hinges upon the meaning of the single word "representative" as used in Section 302(a) and (b) of the Taft-Hartley Act (Section 186 of 29 U.S.C.). The word is nowhere in terms defined in the Act, but its meaning is not left open to general construction. Section 501 (Section 142 of 29 U.S.C.), dictates, without latitude, that the word "shall have the same meaning as when used in the National Labor Relations Act as amended by this Act." The National Labor Relations Act as amended by the Taft-Hartley Act is Title I of the latter

Act, corresponding with Sub-Chapter II of Chapter 7, Sections 151 to 168 of 29 U.S.C.

The question as to the meaning of "representative" is thus transferred to the amended National Labor Relations Act and its meaning as used elsewhere in the Taft-Hartley Act or in common parlance, is without significance.

The word "representative" is used in the amended National Labor Relations Act 28 times. With one exception it is used in each of the 28 instances as meaning the representative of employees for collective bargaining purposes. Even in the exceptional instance in which the word is used with reference to employers (Section 8(b) (1)), the reference is to "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances". No one (including the Government, the District Court, Judge Hand in his dissenting opinion, in the Court of Appeals, and the District Court of Minnesota) has been able to point to a single use of the word in the amended National Labor Relations Act in any other sense.

The matter comes to this. If the term "representative" be given the meaning as used in the amended National Labor Relations Act, then it does not apply to officers, as such, of labor unions which have been selected as collective bargaining agents by employees. If the word is not so used, then its meaning is not indicated by the Act and it becomes so uncertain and speculative as to render Section 302(a) and (b) invalid under the Fifth Amendment.

The alternative suggestion by the Government that "representative" be assigned its "ordinary", "usual", "everyday" meaning is without justification. It would provide no solution of the problem which would arise if the uses in the amended National Labor Relations Act should be disregard-

ed. The suggested meaning would not satisfy the constitutional requirement of clarity and certainty. Whether the suggested interpretation of the word would be admissible would remain, as it is, a matter of controversy incoı istent with the certitude required of criminal statutes. That this is so has been sharply demonstrated by the facts (a) that the proper meaning of the word and whether the Government's version can be entertained is a question upon which even lawyers and judges have disagreed, the highest court which has passed upon the question having held the Government's contention to be clearly erroneous, and (b) those who have argued in support of the Government's view have found it necessary to resort to and largely rely upon legislative history.[1] A criminal statute shrouded in such doubt on its face that its meaning can only be resolved by a study of legislative history cannot consistently with due process furnish the basis for criminal prosecution.

The District Court of Minnesota while adopting the Government's theory unwittingly exposed the inefficacy of that theory from the constitutional standpoint when it said:

> "Two schools of thought have arisen as to the meaning of the term 'representative'," one of which referred to was that represented by the decision of the Court of Appeals in the instant case.

If the meaning of "representative" in Section 302 be so obscure, uncertain and difficult of ascertainment that the trained minds of lawyers and judges divided into "schools of thought" regarding it, contending with equal confidence for conflicting views, it becomes wholly absurd to claim, on the

[1]The District Court reached its conclusion almost wholly upon legislative history. In its brief in this Court the Government has devoted more than half of its argument to legislative history.

other hand, that it is so clear and definite that citizens of ordinary intelligence should be held responsible for any failure to readily grasp and understand its meaning. Surely they, more than lawyers and judges, can be excused if they separate into "schools of thought" in their efforts to solve such a riddle.

Consider the dilemma of a citizen wishing to conform his conduct to the standard of Section 302, (a) and (b), assuming the position of the Government to be possessed of any substance. First he must examine 18 different sections and 28 different uses of the term "representative" as used in the amended National Labor Relations Act, then repair to the Congressional Library for a study of indefinite duration of the legislative history of Section 302, then weigh the merits of the different conclusions reached by lawyers and judges as to the meaning of the pivotal word upon which may depend the legal or criminal nature of a proposed act. The Fifth Amendment does not leave citizens exposed to any such burden in the avoidance of crime.

The Government advances the theory that the word "representative" as used in the amended National Labor Relations Act is accompanied by qualifying words importing in each case a collective bargaining agent and that this does not preclude construction of the word "representative", when isolated from the context, as having its "usual" or "ordinary" meaning.

It is true that either by direct qualifying words or by context the term "representative" in the amended National Labor Relations Act is limited in meaning to collective bargaining representative. That is why that Act is referred to by Section 501 for the meaning of the word as used in Section 302. On the other hand, if, as the Government argues, Congress by

Section 302 intended to give the word "representative" its "usual", "ordinary", "everyday" meaning (assuming there is any such meaning, which is not conceded), its command that its meaning be found in its usage in the amended National Labor Relations Act is utterly inexplicable. Obviously if Congress intended the word to have some usual, commonly recognized and understood meaning, it would either (a) have said so, or (b) have said nothing. Standing alone, without limitation or explanation, the word would have to be accepted in its ordinary meaning, if such there be. Instead of leaving it so, Congress in effect disclaimed any intention of using the word in any broad, general, indefinite sense, by restricting its meaning by reference to its usage in a special sense. That is the only rational conclusion to be drawn from the resting of the meaning on the amended National Labor Relations Act, which could not conceivably further any purpose of giving the word the broad general meaning the Government advocates.

The decision of the Court of Appeals as to the meaning of "representative" is correct and it is only by adhering to its conclusion that Section 302 can be saved from unconstitutionality.

The term "representative" of employees by legislative use and common understanding is inseparable from the qualifying phrase, express or implied, "of their own choosing". One who seeks to attach to the word, in labor legislation, a novel and different meaning has the burden of showing a clear and unmistakable use in the new and unfamiliar sense. There is no such showing.

The relation of "representative" can exist only by choice of the represented or by imposition. No one in this case claims imposition. Equally impossible is it for anyone to claim that the respondent Ryan was chosen as representative by the employees of Kennedy & Sons. Each unit of employees choose either the individual or labor union to represent them in collective bargaining. They do not choose and indeed may have no voice in the selection of officers of the union.

There appears to be no proof that Ryan was a representative of Kennedy & Sons' employees unless it be supposed that it was the purpose of the Taft-Hartley Act by legal fiat to saddle upon employees persons as representatives in whose choice they are without voice and to whose selection even as officers of the union in question, (if they participated or had opportunity to participate at all), they may have unanimously been opposed. That would be clear imposition.

If by virtue only of a position with a union one can become the representative of employees, what positions are included and in what order as to authority? Does the rule apply to all officers, stewards, business agents, organizers, attorneys, or whom? It would be no answer to say that it includes at least the president. The act is either valid or void on its face, without reference to whether it might be valid if applicable only to certain individuals or classes of persons.

Undoubtedly the constitution and bylaws of unions generally do not purport to give any officer, agent or employee the character of representative of employees and it would no doubt be a matter of amazement to any employee unit to learn that in voting for a union as representative, it was also voting for any or all of the officers of the union to also be representatives, with the result that the employees would have as many representatives, in addition to the union, as the union had

officers, and perhaps agents in various degrees of importance and authority.[1] Suppose the officers of a union, all assuming to act as representatives, should disagree among themselves as to any proposed course of action on behalf of the employees. Whose voice is to be heard above the others? Are the officers to be graded as representative No. 1, representative No. 2, etc., in accordance with the supposed rank of their various offices? The whole theory is incongruous.

If the officers of a union are not selected by employees as representatives and if the constitution and bylaws of the union do not purport to give them that character (without implying that it could), whence then comes any color of authority to act as representative of employees?

The amended National Labor Relations Act provides that:

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining. * * *"
>
> 29 U.S.C. 159.

There is no suggestion in the Taft-Hartley Act, including the amended National Labor Relations Act, whereby anyone can become a representative of employees for any purpose except by a majority vote of an appropriate unit of employees. If there be any other means, it must be by virtue of some principle of common law. There is no common law principle which can impose ex officio representatives on employees' units.

[1] The unreasonableness of the Government's position in this connection is further emphasized when consideration is given to the "fluid and elective nature of the official personnel of labor unions", commented upon in *National Labor Relations Board vs. Dant*, 344 U. S. 375, 383.

Those contending that officers of unions should be regarded as representatives of employees do not explain their concept of the nature of the representation involved. Representatives in what sense? For what purpose? With what authority? Are such officers representatives only for the purpose of rendering criminal, under Section 302, payments to them by employers? That appears to be the extent of the representation so far as we have seen any attempt to define it.

The Government in its brief (p. 18) asserts that taking the statutory "definition" together with Webster's, the phrase "any representative of any employees" would seem clearly to cover "any individual who speaks for the employees as a labor union officer" and again (p. 23) "representative is used broadly to encompass any person, individual or entity who or which acts on behalf of the employees". This again is representation by imposition. It omits the indispensable element of authority. Assuredly an individual or entity who or which assumes to speak or act on behalf of employees without authority cannot speak or act as a "representative". Officers of a union have not as such authority in their own names to act or speak on behalf of the employees who have chosen the union as their representative. They can only act or speak on behalf of and in the name of the union. By no process of permutation can a union and its officers become interchangeable so that if the one is a representative the other is also.

The Government points to the use of the word "representative" in Titles II and IV of the Taft-Hartley Act in senses at variance with bargaining representatives. If there be such variance, it well explains why the word as used in Section 302 is differentiated from such uses by attaching to it the meaning of the amended National Labor Relations Act, thereby

effectively excluding any contrary meaning it might have under other provisions of the Taft-Hartley Act.

The Government argues that its construction of the statute would render the Act more effective to accomplish the supposed purpose of Congress, but a criminal statute cannot be enlarged beyond its face in the interest of effectiveness.

> "It is axiomatic that statutes creating and defining crime cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offense, and before a man can be punished his case must be plainly and unmistakably within the statute.' United States vs. Lacher, 134 U.S. 624."

Todd vs. United States, 158 U.S. 278-282. To the same effect is *United States vs. Weitzel,* 246 U.S. 533, 543.

Test of Constitutionality

This Court has frequently laid down the rules respecting constitutionality applicable to criminal statutes.

In *Lanzetta vs. New Jersey,* 306 U.S. 451, 453, it was said:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

In *Williams vs. North Carolina,* 325 U.S. 226, 276, the rule was thus stated:

> "This court has said that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of the due process of law."

Again, in *United States vs. Cardiff*, 344 U.S. 174:

"The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid * * * may be as much of a trap for the innocent as the ancient laws of Caligula."

Further in *Connally vs. General Construction Co.*, 269 U.S. 385, 391:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant and alike with ordinary notions of fair play and the settled rules of law."

Complementary Rules

Complementary of the rule laid down as above is the further rule that as between two possible interpretations of a statute, one of which is consistent with validity and other not, the former will be adopted. On that subject this Court has expressed itself as follows:

"This court has consistently favored that interpretation of legislation which supports its constitutionality."

Screws vs. United States, 325 U.S. 91, 98.

"The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." (citing cases)

National Labor Relations Board vs. Jones & Laughlin Steel Corp., 301 U.S. 1, 30.

This rule of preferential construction extends to cases where a particular construction would only give rise to serious doubt as to validity. Thus in the *Jones & Laughlin* case, supra, this Court added to the passage quoted: "Even to avoid a serious doubt the rule is the same." In *Ashwander vs. Tennessee Valley Authority*, 297 U.S. 288, 348, it was said:

> "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Criminal Statutes Are to Be Strictly Construed in Favor of the Accused

This is another applicable rule well established by the decisions of this and other courts.

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used."
>
> *United States vs. Resnick*, 299 U.S. 207, 209.

In *Federal Communications Commission vs. American Broadcasting Co.*, 347 U.S. 286, 296, this Court spoke of "the well established principle that penal statutes are to be strictly construed".

This rule has been affirmed in the Circuits and the highest Appellate Courts of the states in cases almost without number. One statement from a Federal and one from a State Court will suffice as illustrations.

> "The statutes must be construed as creating a felony for their violation. Hence, in construing this penal legislation, it is elemental that if it be subject to two ra-

tional interpretations we must accept that favorable to the accused."

Cardiff vs. United States (9th Cir.), 194 F. 2d 686, 688.

However much some may disagree with the construction placed upon Section 302 by the Court of Appeals, no one will for a moment contend that that construction is not a rational one.

"The rule is well sett ed that criminal statutes are to be strictly construed and doubts, if any, resolved in favor of the accused."

State vs. DiPaglia, (Ia.) 71 N.W. 2d 601, 607 (1955).

Question of Constitutionality May Be for This Court

The issue of constitutionality was presented to the Court of Appeals but that Court, finding ground for reversal in its construction of Section 302, refrained from consideration of the constitutional question. Should this Court disagree with the Court of Appeals on construction, the constitutional question would then be properly before it for decision notwithstanding the lack of a decision upon it by the Court of Appeals. *United States vs. American Railway Express Co.,* 265 U.S. 425, 435, *Langnes vs. Green,* 282 U.S. 531, 538, *United States vs. Ballard,* 322 U.S. 78, 88.

CONCLUSION

The mandate of Section 501(3) of the Taft-Hartley Act directing the meaning of "representative" to be found in the amended National Labor Relations Act, allows no choice or latitude but compels acceptance of the usage of the latter Act as the sole guide to the intended meaning of the word. The word is there used in the sense of collective bargaining representative and in no other sense. If that meaning be adopted, there is no constitutional or other question in the case, and the affirmance of the decision of the Court of Appeals necessarily follows. The respondent Ryan admittedly was not a collective bargaining representative of the employees of Kennedy & Sons.

The Government's position respecting the meaning of "representative" is untenable but if by any stretch of tolerance it could be regarded as possibly in accord with the Congressional intent, it would nevertheless have to be rejected on constitutional grounds since that is not "clearly", "plainly" and "unmistakably" the meaning intended, nor would it necessarily be so regarded or understood by a person of ordinary intelligence.

The existing controversy over the meaning of the word and the widespread rejection of the Government's version, including that by the Court of Appeals, is ample evidence that it is at best clouded with uncertainty and ambiguity.

The Government's contention is further excluded from favorable consideration by the rule favoring construction supporting constitutionality over that resulting in unconsti-

tutionality or serious doubt of constitutionality, and by the further rule that criminal statutes are to be strictly construed in favor of the accused.

Respectfully submitted,

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